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NO. 79-1530

in the

Supreme Court
of the
United States

October Term, 1979

JACQUELYN RENEE TOWN,
Appellant,

vs.

THE STATE OF FLORIDA ex rel.
JANET RENO, etc., and the
CITY OF MIAMI BEACH, FLORIDA,
Appellees.

On Appeal from the Supreme Court of Florida

MOTION TO DISMISS

JIM SMITH
Attorney General of the
State of Florida

JANET RENO
State Attorney of the Eleventh
Judicial Circuit of Florida

ARTHUR JOEL BERGER
Assistant State Attorney
1351 Northwest 12th Street
Miami, Florida 33125
Tel. (305) 547-7094

COUNSEL FOR APPELLEE
JANET RENO

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MOTION TO DISMISS

Appellee, JANET RENO, moves this Court to dismiss Question One (1) of Appellant Town's appeal[1] for lack of a substantial federal question for the following reasons.

Appellant Town asserts a violation of the Free Exercise Clause of the First Amendment as a result of the application of several state statutes to prohibit Ms. Town's dwelling house from being used as a place where the drug cannabis (marijuana) is illegally kept for and used by numerous adults and children.

Appellant Town concedes that this appeal does not involve errors of fact. (Jurisdictional Statement at page 18).[2] Consequently, this aspect of the litigation presents no constitutional problem.

Both the trial court and the Supreme Court of Florida utilized the proper constitutional analysis mandated by *Wisconsin v. Yoder,* 406 U.S. 205 (1972), when they assessed a Free Exercise Clause challenge to the application of facially neutral state statutes. This approach to resolution of the case is not constitutionally suspect.

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[1]Appellant Town presents two mutually exclusive issues involving distinct interests of two different sovereigns. Appellee Reno cannot properly represent the zoning law interests of the City of Miami Beach, Florida. Consequently, the City of Miami Beach, Florida is responding separately to Question Two (2) raised by Appellant Town.

[2]Absent the most exceptional circumstances, this Court will accept factual determinations in which the trial and appellate courts have concurred. *Branti v. Finkel,* ____ U.S. ____, 100 S.Ct. 1287, 1291 n. 6 (1980); *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.,* ____ U.S. ____, 100 S.Ct. 937 (1980). This rule applies even where a question of fact may have constitutional significance. *Time, Inc. v. Firestone,* 424 U.S. 448 (1976).

Both the distribution for use and use of cannabis were found to be religious practices of Ms. Town's particular religious sect and were found to be practices motivated by Ms. Town's sincere religious belief. Thus, there is *not* presented on this appeal an infringement of the Free Exercise Clause's prohibition against civil court litigation in ascertaining a sect's religious practice, in proving the truth or falsity of a religious belief or in determining the presence or absence of fraud. *See Jones v. Wolf,* ____ U.S. ____, 99 S.Ct. 3020 (1979); *Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696 (1976); *Fowler v. Rhode Island,* 345 U.S. 67 (1953); *United States v. Ballard,* 322 U.S. 78 (1944). Moreover, these are favorable findings about which Appellant Town can have no complaint.

As required, the Florida courts determined whether a compelling state interest existed. As a matter of law, the interests of public health and public safety regarding drug use are a well-settled, permissible and vital part of a government's police power. *Whalen v. Roe,* 429 U.S. 589 (1977); *Robinson v. California,* 370 U.S. 660 (1962); *Barsky v. Board of Regents,* 347 U.S. 442 (1954); *State of Minnesota ex rel. Whipple v. Martinson,* 256 U.S. 41 (1921). "The public interest in preventing drug traffic is great, ..." *United States v. Mendenhall,* ____ U.S. ____, 48 U.S.L.W. 4575 at 4580 (1980) (Powell, J., concurring). In every case specifically and directly presenting a head-on clash between the public interests in health and safety on the one hand and the Free Exercise Clause on the other, this Court has ruled in favor of these particular governmental interests. *Jehovah's Witnesses v. King County Hospital,* 390 U.S. 598 (1968), *per curiam affirming without opinion,* 278 F.Supp. 488 (W.D.

Wash. 1967) (blood transfusion); *Prince v. Massachusetts,* 321 U.S. 158 (1944) (children working on streets); *Jacobson v. Massachusetts,* 197 U.S. 11 (1905) (vaccination against small-pox epidemic). When engaged in general discussions of the Free Exercise Clause, this Court has given preeminence to public interests in health and safety. *McDaniel v. Paty,* 435 U.S. 618 at 634 (1978) (Brennan, J., concurring) (prohibiting dangerous snake-handling or human sacrifice); *Wisconsin v. Yoder,* 406 U.S. 205 at 230 (1972) (protecting physical or mental health of child); *Poulos v. New Hampshire,* 345 U.S. 395 at 409 (1953) (requiring permits to run businesses, erect structures, purchase firearms, transport or store explosives or inflammatory products, hold public meetings without prior safety arrangements); *Cleveland v. United States,* 329 U.S. 14 (1946) (prohibiting Mann Act violation); *Chatwin v. United States,* 326 U.S. 455 (1945) (prohibiting kidnapping); *Cox v. New Hampshire,* 312 U.S. 569 at 574 (1941) (prohibiting person from ignoring familiar red traffic light even if he thought it his religious duty to disobey the municipal command); *Cantwell v. Connecticut,* 310 U.S. 296 at 308 (1940) (prohibiting exhortation of others to physically attack members of another religious sect; and preventing clear and present danger of riot, disorder, interference with traffic upon public streets or other immediate threat to public safety, peace or order); *Reynolds v. United States,* 98 U.S. 145 at 166-167 (1878) (preventing human sacrifice, preventing wife from burning herself on funeral pyre of dead husband, preventing parent from starving child to death). Thus, no error of constitutional law was committed as a result of a legal conclusion that public health and safety regarding the use of cannabis is a compelling state interest.

As a matter of law, the compelling state interests being asserted must be *the* interests directly implicated by the conduct involved in the very case at issue. *See Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Sherbert v. Verner,* 374 U.S. 398 (1963). Here, indiscriminate use of cannabis by numerous adult and child guests, as well as driving on the public highways, was evident. Thus, the interests being asserted were specifically triggered by the facts of this case. And, consequently, no constitutional error presents itself at this point in the analysis of the lower courts.

The Florida courts were required to engage in and did engage in a balancing process between the conduct at issue and the specific state interests involved. In this regard, the trial court expressly found *absent* actions by Appellant Town that serve to counter-balance or neutralize the State's compelling interests. Ms. Town did not assert that consumption of cannabis would be stopped or that her guests would be barred from driving to or from her dwelling house. Moreover, it is obvious that Ms. Town is powerless to control the effect of cannabis use either on those she allows to partake of her sacrament or on those otherwise uninvolved members of the general public who could be affected by the conduct of those whom she allows to partake. *Compare Wisconsin v. Yoder, supra.* As a result of balancing, the conclusion in this case was, simply put, that the protective privilege ends where the public peril begins. From a constitutional perspective, this ultimate conclusion has no flaw.

Where First Amendment freedoms are involved, the Government may not choose means that unnecessarily

restrict constitutionally protected liberty, even when it can lawfully impose restrictions. Thus, States are constitutionally required to adopt the least drastic means to achieve their ends. The State must employ means closely drawn to avoid unnecessary abridgment. The limitation must be no greater than is necessary or essential to protect the particular governmental interest involved. The sweep of the restriction must not be unnecessarily broad. *Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173 (1979); *Elrod v. Burns,* 427 U.S. 347 (1976); *Procunier v. Martinez,* 416 U.S. 396 (1974). This law applies to injunction orders and requires that the order in question must be tailored as precisely as possible to the exact needs of the case. *Carroll v. President and Comm'rs of Princess Anne,* 393 U.S. 175 (1968). In this case, none of these principles were violated. The objective of this litigation was prevention of a specific threat to public health and safety, not punishment. Therefore, the use of an injunction was a constitutionally proper alternative. The injunction, itself, cuts with a surgeon's scalpel, not a butcher's knife. Only the use of cannabis at the dwelling house is proscribed. No other religious practice is curtailed.[3] No religious beliefs, as opposed to religious actions, are suppressed. No other constitutionally protected freedom is curtailed. The forbidden activity is concrete, discrete and clearly identifiable. Unlike what could occur in other ephemeral areas of the First Amendment, a violation of this order can be easily and scientifically determined. Thus, enforcement of this order facially poses no greater threat than is permissible and essential to protect the particular governmental

[3]Obviously, Appellee Reno is confining this remark to her portion of the order and not that portion involving the zoning laws of the City of Miami Beach, Florida.

interests involved. *Compare Vance v. Universal Amusement Co.*, ____ U.S. ____, 100 S.Ct. 1156 (1980). On its face, the injunction order entered in this case does not transgress the above constitutional mandate.

Appellant Town insists that this Free Exercise Clause litigation requires the State to do more than demonstrate relevant compelling state interests, and specifically prove the occurrence of misconduct implicating those interests. Rather, as Ms. Town views the Constitution, State reliance on a generalized presumption of cause and effect, based as it might be on specific scientific studies or lay observation, is not enough. Ms. Town's position is that the State must specifically prove that her conduct, or the conduct of her guests, resulted in the feared harms. To be more precise, she points to an absence of evidence that her physical or mental health, or that of her guests, has deteriorated as a result of using cannabis and further points to the absence of evidence that anyone had been harmed by a vehicle driven by her, or one of her guests. But, this Court has expressly rejected a First Amendment requirement of nothing less than proof of actual injury to the involved individual, where the State's laws at issue are prophylactic measures whose objective is the prevention of harm before it occurs. Proof of *her misconduct, or the misconduct of her guests,* under circumstances *likely* to result in the adverse consequences that the State seeks to avert, suffices. *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 (1978); *In re Primus,* 436 U.S. 412 (1978); *Procunier v. Martinez,* 416 U.S. 396 at 414 (1974). In this case, Florida did not commit constitutional error by failing to await a post-mortem examination or to first compel Ms. Town and

her guests to undergo vivisections. Indeed, the imposition of such a requirement could lead to results such as court ordered medical examinations which, themselves, could become a tool to persecute religious sects and suppress religious freedom.

Finally, Appellant Town contends that the trial court's order in this case did not employ the least restrictive alternatives available to satisfy the state interests involved. The general legal principles governing this aspect of First Amendment litigation have been stated above and need not be repeated.

First, Ms. Town asserts that the injunction should not have extended beyond a prohibition of the use of cannabis by children at Appellant Town's dwelling house. This claim must fail. While giving drugs to school children may be more offensive, the State's compelling interests have wider reach and include the safety and health of adults, as well as children. Because of this fact, the limitation on both of these classes is no greater than is necessary and essential to protect the particular governmental interests involved. Consequently, the Constitution does not require the State to view this suggestion as a rational and satisfactory alternative. Nor is there a constitutional basis for a dichotomy between consenting adults and children in this area. *See Paris Adult Theatre I v. Slaton,* 413 U.S. 49 at 68-69 (1973). Moreover, Appellant Town overlooks two crucial factual findings in the trial court. "Cannabis is freely given for use to . . . children who are not members of the faith as a part of proselytizing." And, "It is part of the [religious] practice that the children of adult members of the faith are permitted to smoke cannabis

as part of their upbringing in the faith." (Appendix to Jurisdictional Statement at 14a). Given those findings, this proposed alternative is not a less drastic means to achieve governmental ends in the constitutional sense at issue here.

Second, Ms. Town asserts that a less restrictive alternative satisfying the State's compelling interest in safety is enforcement of existing laws prohibiting use of an automobile while under the influence of cannabis. This proposed alternative is not preventative and, therefore, does not satisfy the State's main objective. Rather, this suggestion would take effect when the individuals in question were already driving on the roads, thereby bringing the potential injury at issue even closer to realization. Moreover, this alternative is not less restrictive, but merely changes the location at which the same restriction applies and the same degree of interference with religious practice occurs.

The third and last "less restrictive" alternative fares no better than the other two. Ms. Town suggests that the injunction be limited to a prohibition of the use of cannabis at her dwelling house by anyone not a church member. But, the State's compelling interests in public health and public safety cover all persons, members and non-members alike. Because of this fact, the limitation on both of these classes is no greater than is necessary and essential to protect the particular governmental interests involved. Consequently, the Constitution does not require the State to view this suggestion as a rational and satisfactory alternative. Moreover, Appellant Town ignores a crucial finding of the trial court that "Cannabis is freely given for use to adults and children who are not members of the faith as

part of proselytizing." (Appendix to Jurisdictional Statement at 14a). Given that finding, this proposed alternative is not a less drastic means to achieve governmental ends in the constitutional sense at issue here. Worse still, that proposed alternative, if contained in the trial court order, would run afoul of the Establishment Clause by casting the State and the courts in the role of arbiters of what is necessary to constitute a member of this religious sect and who the members are. *Committee For Public Education v. Regan,* ___ U.S. ___, 100 S.Ct. 840 (1980); *N.L.R.B. v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979); *New York v. Cathedral Academy,* 434 U.S. 125 (1977). Surely the Constitution cannot compel a violation of the Constitution as a means of satisfying the Constitution.[4] Ironically, a comparable provision of that portion of the trial court's order directed to the zoning violations is the same basis upon which Appellant Town, herself, asserts a violation of the Establishment Clause (Jurisdictional Statement at 21).

There is no error of fact. The Florida courts neither expanded, contracted nor contravened any

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[4]Ms. Town does not consent to a modification of the court order to realize this alternative proposed by her. Compulsion by court order is still required. But, even if she consents, that fact would not avoid the inherent Establishment Clause problem. *Committee For Public Education v. Nyquist,* 413 U.S. 756 (1973); *Engel v. Vitale,* 370 U.S. 421 (1962).

Arguably, no violation of the Establishment Clause would occur if this Church, itself, was the final determiner of who its members were. *Jones v. Wolf,* ___ U.S. ___, 99 S.Ct. 3020 (1979). But, that would place control of the order in the hands of this Church. Since the fox should not guard the chicken coop, a counter-argument along this line is unacceptable.

constitutional principle of law established by this Court. There is no constitutional error resulting from the application of established law to the established facts. Consequently, when viewed from every relevant perspective, *this* case *does not* involve a *substantial* federal question. Jurisdiction is thus lacking. This Court's general statement in *McDaniel v. Paty,* 435 U.S. 618, 628 n. 8 (1978), that it has not yet passed on the conclusions of other comparable cases does not, itself, create a substantial federal question in *this* case.

WHEREFORE, Appellee, JANET RENO, respectfully requests this Court to dismiss Question One (1) of Appellant Town's appeal for lack of a substantial federal question.

Respectfully submitted,

JIM SMITH
Attorney General of the State of Florida

JANET RENO
State Attorney of the Eleventh Judicial Circuit of Florida

By /s/
ARTHUR JOEL BERGER
Assistant State Attorney
1351 Northwest 12th Street
Miami, Florida 33125
Tel. (305) 547-7094

COUNSEL FOR APPELLEE JANET RENO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the above Motion to Dismiss have been mailed to *both* Milton M. Ferrell, Jr., Counsel for Appellant Town, 169 East Flagler Street, Suite 1639, Miami, Florida 33131 *and* John A. Ritter, Counsel for Appellee the City of Miami Beach, Florida, 1700 Convention Center Drive, Miami Beach, Florida 33139, on this the 20th day of June, 1980.

/s/
ARTHUR JOEL BERGER
Assistant State Attorney